No. 416

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

WALLACE & TIERNAN COMPANY, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

PROBABLE JURISDICTION

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WALLACE & TIERMAN COMPANY, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

STATEMENT AS TO JURISDICTION

(Filed October 4, 1948)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on August 6, 1948. A petition for appeal is presented to the district court herewith, to wit, on October 4, 1948.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of

February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *National City Lines, Inc.*, 334 U. S. 573; *United States* v. *Columbia Steel Co.*, 334 U. S. 495.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
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> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
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> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceed-

ings in equity to prevent and restrain such violations. * * *

THE ISSUES AND THE RULING

This is a civil proceeding filed in the district court of the United States for the District of Rhode Island on November 18, 1946, charging six corporations and seven of their officers with conspiring to restrain and monopolize interstate commerce in chlorinating equipment, in violation of Sections 1 and 2 of the Sherman Act. On the day on which this suit was filed a grand jury empaneled by the same district court returned an indictment making substantially the same charges against the same defendants and certain others.

Prior to November 18, 1946, the corporations subsequently indicted had produced some 200,000 pages of documents before the grand jury in obedience to subpoenas duces tecum which the court had sustained against defendants' motions to quash on the ground that the demands of the subpoenas were so broad and indefinite as to constitute an unreasonable search and seizure contrary to the Fourth Amendment. Some 8,000 of the subpoenaed documents, constituting those deemed relevant to the issue of law violation, were photostated, numbered, and indexed by the Government.

Following the decision in *Ballard* v. *United States*, 329 U. S. 187, the defendants moved to dismiss the indictment upon the ground that the grand jury had been illegally constituted in that women had been intentionally and systematically excluded from the panel. The district court upheld these motions and entered judgment on April 7, 1947, dismissing the indictment. The Government, believing this decision correct, took no appeal from the judgment of dismissal. An order direct-

ing return to the defendants of all documents produced before the grand jury was also entered.

In May 1947, the Government filed a criminal information (No. 6070) making the same charges against the same defendants as those made in the indictment (No. 6055) which had been dismissed. The defendants then moved that all photostats of documents which had been produced before the grand jury be returned to them, and the court, by an opinion filed February 6, 1948, granted defendants' motions. The grounds of the court's decision were that the production of documents pursuant to subpoena constitutes a search and seizure; that such search and seizure become unreasonable when it turns out that the grand jury for whose use the documents were produced had been illegally constituted; and that photostats of documents so produced are fruits of an illegal search and seizure and therefore may not be retained. The court's order, which was made part of the record in No. 6055, directed return of the photostats on or before April 20, 1948.

On April 14, 1948, the court ruled on a motion made by the defendants for an order dismissing the criminal information or, in the alternative, expunging all portions thereof based on knowledge obtained from documents produced before the grand jury, and for an order precluding the Government from using in any way or for any purpose any knowledge or information obtained from these documents. The court denied the motion to dismiss or expunge upon the ground that it could not presently say that the Government might not be able to obtain evidence in support of its allegations from sources other than the documents produced before the grand jury. As to the motion to preclude, the

court held that its opinion of February 6, 1948, was controlling and on April 20, 1948, it entered an order of preclusion in the broad language of defendants' motion.

In the civil case, the Government on May 14, 1948, filed a motion under Rule 34 of the Federal Rules of Civil Procedure for the production by defendant corporations of the documents which they had produced before the grand jury and which had been photostated by the Government, as identified in an attached schedule. Later the Government procured the issuance of subpoenas duces tecum, directed to the corporations previously indicted, for the documents produced before the grand jury and photostated by the Government, as identified by attached schedules. After the filing of motions to quash these subpoenas the district court on May 24, 1948, denied the Government's motion for the production of documents under Rule 34 and granted the motions to quash the subpoenas duces tecum. Formal orders giving effect to the court's rulings were entered on June 1, 1948.

At the trial the Government stated that the documents for which subpoenas had been issued constituted substantially all of the Government's case and that such evidence as it had apart from these documents was so incomplete and piecemeal as to be virtually meaningless. The Government called upon the defendants to produce the subpoenaed documents and moved the court to vacate its orders quashing the subpoenas. When the court denied this motion, the Government put on the stand an attorney who had participated in the grand jury proceedings and sought to elicit testimony from him as to the contents of the documents produced before the grand jury. After the court had ex-

cluded such testimony, the Government filed, by way of an offer of proof, an affidavit of counsel averring that the subpoenaed documents are relevant and material to the issues in the case and "constitute substantially all of the Government's evidence in this case." The Government then rested and asked the court to enter judgment for the plaintiff. Defense counsel stated that, in the existing posture of the case, the defendants were not called upon to present any evidence and would not do so.

The court, at the conclusion of the trial, took the case under advisement. It filed an opinion on August 6, 1948, which quotes extensively from the transcript of the trial, states that the reality "practically amounts to non-prosecution" by the Government, and directs entry of judgment dismissing the action without prejudice.

THE QUESTIONS ARE SUBSTANTIAL

The Court's rulings at the trial excluded, or prevented the Government from presenting, substantially all evidence which it had in support of the allegations of its complaint. The sole basis for these rulings was the interpretation which the trial court placed upon the scope and application of the Fourth Amendment. The appeal, in challenging this interpretation, presents two related questions of constitutional law which are of substance and of general public importance.

The first of these questions is whether there is an unreasonable search or seizure within the meaning of the Fourth Amendment when documents are produced before a grand jury in response to subpoenas which are sufficiently definite in their demands and which call for documents the Govern-

ment is entitled to have produced, if it turns out that the grand jury has been illegally constituted.

In considering the prohibitions of the Fourth Amendment, it is necessary to distinguish between cases of actual search and seizure and cases of the "figurative" or "constructive" search involved in the production of books or records in obedience to judicial process (*Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 202). A true search or seizure directly invades rights of privacy which the Fourth Amendment is designed to secure. The intrusion, to be reasonable and therefore permissible, must have legal sanction. Such sanction is given when the search is authorized by a valid search warrant or by those special conditions which the law has long recognized as justifying search or seizure without a warrant.

There is, on the other hand, no actual search or seizure when documents are produced pursuant to legal process. To the extent that this may be a "constructive" search (cf. *Boyd v. United States*, 116 U. S. 616, 634-635), the rights of privacy protected by the Fourth Amendment are infringed only if the demands made through the medium of judicial process in themselves exceed the limits of reasonableness. Thus the Fourth Amendment may be violated if the demands of a subpoena are so sweeping that they can be characterized as a fishing expedition embarked upon on the possibility that it may uncover evidence of crime. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-306; *Hale v. Henkel*, 201 U. S. 43, 76-77. But where, as in the present case, "a writ, suitably specific and properly limited in its scope, calls for the production of documents which * * * the party procuring its issuance is entitled to have

produced"; there is no unreasonable search and seizure within the meaning of the Fourth Amendment. *Wilson* v. *United States*, 221 U. S. 361, 376. In this situation, the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth" in the things required to be produced. *Oklahoma Press Publishing Co.* v. *Walling, supra*, at p. 208.

We point out that if the Government prevails in its contention that no constitutional right was violated by the production of documents before the illegally constituted grand jury, it follows that the Government might properly utilize customary judicial process and procedure to obtain these documents.

If the production of documents before the grand jury is held to constitute a technical violation of the Fourth Amendment, the appeal will present the constitutional question whether the case comes within the rule requiring the complete suppression of documents or information which the Government has obtained in violation of the Fourth Amendment (*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385). Cf. *Nardone* v. *United States*, 308 U. S. 338. The reasons for the rule are that complete suppression is necessary to give substance to the Amendment's prohibitions and that the Government should not be permitted to profit from its own wrong.

Neither the rule nor the reasons for it apply where the Government has not been a party to the illegal action. It may put in evidence documents received from a private party who had obtained them by theft or trespass. *Burdeau* v. *McDowell*, 256 U. S. 465. In the present case the prosecuting officers of the United States had no part in the only

element of wrongfulness, the improper empaneling of the grand jury. The composition of the panel from which the grand jury was drawn was determined by the district court or officials appointed by the court. While prosecuting officers of the Government participated in obtaining subpoenas calling for production of documents before the grand jury, they are not thereby charged with responsibility for the grand jury's improper constitution. It had been summoned by the court and had *de facto* existence. In these circumstances, the Government's prosecuting officers cannot be held to the duty of deciding for themselves that the grand jury had been improperly constituted. Cf. *Blair* v. *United States*, 250 U. S. 273, 282.

The Government believes that to preclude it forever from access to or use of documents which had once been produced before a wrong body, i. e., an improperly empaneled grand jury, would be a travesty of justice. Not only are the questions presented by the appeal substantial but they concern vital aspects of administration of criminal justice.

Possibly the defendants will contend that the order of preclusion entered in No. 6070 (the criminal information) is *res judicata* and forecloses the Government from using in any manner whatsoever the documents produced before the grand jury, and that the constitutional questions to which we have referred will therefore not be reached on appeal. But irrespective of whether the order of preclusion is limited to the proceeding in which it was entered, it is not conclusive in another proceeding between the same parties. Only final orders may be relied upon as *res judicata*. *Merriam* v. *Saalfield*, 241 U. S. 22, 28; *Smith* v. *McCool*, 16 Wall. 560, 561; *Reed*

v. *Proprietors of Locks and Canals*, 8 How. 274, 294. The criminal information has not been dismissed and the order of preclusion is itself not a final order. Orders on motions to suppress, entered after an indictment has been returned or an information filed, are not appealable. *Cogen v. United States*, 278 U. S. 221; *United States v. Rosenwasser*, 145 F. 2d 1015 (C.C.A. 9).

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

(S.) PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 4, 1948.